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No. 84-442 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTELICENSE CORPORATION, S.A.,
Petitioner,

v.

UNITED STATES OLYMPIC COMMITTEE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
STATEMENT OF PARTIES	4
COUNTER STATEMENT OF THE CASE	5
ARGUMENT	6
I. There Is No Conflict Between Decisions Of The Circuit Courts of Appeal	7
II. There Is No Conflict With This Court's Decisions	7
III. The Decision Below Is Not Likely To Affect Other Litigants	10
IV. Regardless Of The Decision Of This Court On The Issues Presented For Review, The Result In This Case Will Not Change	11
Remaining Undecided Issues	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page(s)

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945) 12

DeFrantz v. U.S. Olympic Committee, 492 F. Supp. 1181, 1192 (D.D.C.), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980) 10

Hodel v. Virginia Surface Mining and Recl. Ass'n, 452 U.S. 264 (1981) 8, 12

IOC v. San Francisco Arts and Athletics, 219 U.S.P.Q. 982 (N.D. Cal. 1982), *aff'd*, No. 82–4467 (9th Cir. 1983) 7

Rescue Army v. Municipal Court, 331 U.S. 549, 568–575, 584, 67 S.Ct. 1409, 1419–1423, 91 L.Ed. 1666 (1947) 12

Socialist Labor Party v. Gilligan, 406 U.S. 583, 588, 92 S.Ct. 1716, 1719, 32 L.Ed.2d 317 (1972) 12

United States v. Clarke, 445 U.S. 253 (1980) 10

United States v. Dow, 357 U.S. 17 (1958) 8-10

STATUTES

17 U.S.C. § 10 (1970) 13

36 U.S.C. §§ 374 (3), 375 (3) 4

Amateur Sports Act of 1978

36 U.S.C. § 380 ..... *passim.*

36 U.S.C. § 380(b) 3

36 U.S.C. § 380(c) 3, 8

Surface Mining Act 8

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent United States Olympic Committee respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Second Circuit's decision in this case.

Respondent has no disagreement with the Petition as to the citation of the decisions below, their reproduction in the appendix to the Petition, the grounds for jurisdiction of this Court or the statute involved with the exception that § 110 of the Amateur Sports Act of 1978 (36 U.S.C. § 380) was not

completely set forth in the Petition (subsections (b) and (c) were omitted). Therefore, § 380 is fully reproduced below.

TITLE 36 UNITED STATES CODE

§ 380. Use of Olympic symbols, emblems, trademarks and names

(a) Without the consent of the Corporation, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

shall be subject to suit in a civil action by the Corporation for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be

prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsections (a)(3) and (4) of this section for any lawful purpose prior to enactment of this chapter shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) The Corporation may authorize contributors and suppliers of goods or services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the Corporation or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

STATEMENT OF PARTIES

Respondent, United States Olympic Committee is a non-profit federally chartered and non governmentally-financed corporation empowered by Congress under the Amateur Sports Act of 1978 to exercise exclusive jurisdiction over all matters pertaining to the participation of the United States in the Olympic Games; to exercise exclusive control over the commercial exploitation in the United States of Olympic-related designations and to shoulder the responsibility for financing the participation of the United States in the Olympic Movement. 36 U.S.C. §§ 374(3), 375(3).

Petitioner, Intelicense Corporation, S.A. ("Intelicense") is a Swiss corporation which is primarily involved in the licensing and marketing of Olympic-related designations, namely pictograms displaying the Olympic symbol with graphic representations of athletes participating in various Olympic sports. It has one employee—its founder and president Stanley R. Shefler.

International Sports Marketing, Inc. ("ISM") is a Vermont corporation that does not have any employees other than its founder and president, Ronald Kulka. ISM has little, if any, ongoing business except to serve as "a receptable for contract rights and the profits associated with the exploitation of those rights by others." (District Court Opinion filed April 27, 1983 at 7).

Although identified as a party by Intelicense, ISM did not file a brief before the Second Circuit Court of Appeals and has not sought review by this Court.[1]

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[1]The claims against two other original parties to this action, sublicensee's of Intelicense (Millsport, Inc. and Sport Graphics, Inc.), were disposed of by entry of permanent injunctions prohibiting further marketing of the pictograms in this country without the consent of the United States Olympic Committee.

COUNTER STATEMENT OF THE CASE

The essential facts of the dispute are concisely and accurately summarized in the Second Circuit Opinion below. (Petition at 23a–25a).

Circuit Judge Oakes, sitting by designation in the district court, enjoined Intelicense from licensing the pictograms in the United States without obtaining the consent of the United States Olympic Committee. That decision was predicated on three separate grounds:

1. Intelicense's licensing activities contravened 36 U.S.C. § 380;
2. the IOC/Intelicense contracts[2] themselves limited Intelicense's rights to only those countries where Intelicense could obtain the consent of the local National Olympic Committee ("NOC");[3]
3. Intelicense's activities contravened the IOC Charter which requires the approval of any NOC before Olympic emblems containing the Olympic symbol can be marketed in the territory of the NOC.

(Petition at 12a, 25a).

The Court of Appeals affirmed the district court, holding that § 380 was intended to give the United States Olympic Committee "unfettered control over the commercial use of

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[2]The United States Olympic Committee was not a party to these contracts nor did it participate in any of the contract negotiations leading to their formation.

[3]Each country participating in the Olympic Movement has an NOC which is recognized by the International Olympic Committee ("IOC"). Each NOC is autonomous and is not controlled by the IOC. The United States Olympic Committee is the NOC for the United States. (*See* Petition at 8a).

Olympic-related designations" in the United States (Petition at 27a). In characterizing Intelicense's actions, the court stated "we cannot imagine a more blatant violation of the [Amateur Sports] Act." (Petition at 28a).

Intelicense repeatedly attempts to create the impression that the United States Olympic Committee is interfering with the desire of the IOC (which Intelicense asserts is the "owner" of the pictograms) to exploit and market those rights in the United States. This completely ignores the fact, as found by the courts below, that the IOC supported the position of the United States Olympic Committee that no marketing could take place in the United States without the prior approval of the United States Olympic Committee. (*See, e.g.*, Petition at 31a).

ARGUMENT

Respondent United States Olympic Committee respectfully requests that the Petition for A Writ of Certiorari be denied as not properly pertaining to a matter appropriate for this Court's exercise of discretionary jurisdiction. The issues alleged in the Petition do not involve a conflict with the decision of any lower court nor between the decision below and the decisions of this Court. Neither does the decision of the Second Circuit Court of Appeals involve a matter of potentially wide ranging impact likely to affect other litigants. Finally, the judgment against Intelicense was based, in part, on factual findings and alternative grounds which would be unaffected by the decision of this Court on the questions presented for review. Therefore, the Petition should be denied since the decision would remain unchanged regardless of the action taken by this Court.

It is submitted that the instant Petition is based on a simple disagreement with the findings and conclusions of

the district court which were unanimously affirmed on appeal.

I. There Is No Conflict Between Decisions Of The Circuit Courts of Appeal.

Far from the existence of a conflict between circuits, the Second Circuit decision expressly recognized and agreed with the "cogent analysis" of the court in *International Olympic Committee v. San Francisco Arts and Athletics*, 219 U.S.P.Q. 982 (N.D. Cal. 1982), *aff'd*, No. 82–4467 (9th Cir. 1983), and observed that, at least insofar as the purpose of § 380 is concerned, "each court to have passed on the intent of § 380" has agreed with the position of the district court below. (Petition at 27a).

II. There is No Conflict With This Court's Decisions.

The first question presented in the Petition is whether the Amateur Sports Act of 1978 acted to deprive "the undisputed owner [IOC] and exclusive world licensing agent [Intelicense]" of certain property rights in the commercial exploitation of Olympic-related pictograms and thus constituted an unconstitutional taking of property.

Intelicense insists that the Court of Appeals decision is in conflict with established precedent of this Court, which, it is claimed, would set the time of the alleged taking as the time of assertion of § 380 by the United States Olympic Committee in 1980, as opposed to the statutory enactment by Congress of the Amateur Sports Act of 1978. The courts below held that Intelicense had no standing to raise a "taking" claim since it was not the owner of any interest in the property in 1978, the year in which § 380 became law.

The relevant time for determining whether there is a compensable ownership interest for purposes of deciding who may have standing to maintain an action, as held by the

courts below based upon the precedents of this Court, is the time that a taking occurs. A taking occurs when effective control over property is exercised, and not necessarily when a formal declaration of condemnation is issued. *See, e.g., United States v. Dow*, 357 U.S. 17 (1958). The cases relied upon by Intelicense are fully in accord with the holding below, but involved situations where a taking was held to have occurred by virtue of government interference with or control over property *before* there had been formal government action, unlike this case in which the Second Circuit held that the formal state action and assertion of control occurred long prior to the date of Intelicense's contracts with the IOC.

The cases cited by Intelicense as precedent for the proposition that more than a statutory enactment is necessary for a taking are also distinguishable in that the statutes there in question were not directed to specific property to be taken but merely vested general regulatory power in an agency. In *Hodel v. Virginia Surface Mining and Recl. Ass'n*, 452 U.S. 264 (1981), this Court considered the Surface Mining Act and held that the mere enactment of that Act did not constitute a taking.[4] This holding was based on the fact that the Act, on its face, did not prohibit the use of the property by the owner. *See* 452 U.S. at 296.

In the instant case, however, the "property" in question was both specifically identified and all rights therein immediately affected upon enactment of the Amateur Sports Act in 1978.[5] Therefore, even if there had been a "taking" by

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[4]Intelicense's reliance on *Hodel v. Virginia Surface Mining & Recl. Ass'n* is further misplaced because the issue in that case was solely whether the Surface Mining Act was a taking. It did not address the time of taking question.

[5]Section 380(c) plainly states that the United States Olympic Committee is given the "exclusive right to use" the Olympic symbol and other Olympic-related designations.

reason of 36 U.S.C. § 380, contrary to the holding of the district court that none had occurred (Petition at 19a), it would have been against the interests of the IOC which, upon enactment of § 380 *at once* would have lost its rights and, consequently, it would only be the IOC that could properly challenge § 380 as a taking of property.[6]

Furthermore, although Intelicense alternatively asserts that an agency relationship existed between it and the IOC which qualifies it to assert a taking claim on behalf of the IOC, this alleged relationship is of no consequence with respect to Intelicense's lack of standing to raise such a claim. It is a well accepted principle of agency law that an agent acts in the interest of and at the behest of its principal. The courts below found that the IOC "explicitly accepted the authority vested in the United States Olympic Committee by § 380 to control marketing of the Olympic symbol in the United States" and that the IOC directed Intelicense to cease its licensing activities in the United States. (Petition at 31a n.6). Therefore, the findings of fact below compelled the conclusion that petitioner was neither empowered nor authorized to act on the IOC's behalf in conducting this litigation or in raising a "taking" claim.

It is, therefore, evident that the Second Circuit properly applied the correct rule in *United States v. Dow*, *supra*, and

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[6]The IOC has not challenged § 380 as a taking. Indeed, the Second Circuit affirmed the decision of the district court, which found as a matter of fact that the IOC, the alleged *owner* of the pictograms, asserted no right to license the pictograms in the United States without the consent of the United States Olympic Committee. In fact, the IOC had instructed its alleged "world licensing agent" to discontinue its marketing activities in the United States, acknowledging that the United States Olympic Committee had the exclusive rights to control the marketing of Olympic-related designations in the United States. (Petition at 31a).

that Intelicense merely disagrees with the finding of the court as to the time of taking. Since Intelicense has shown no circumstance or fact which would tend to suggest that there has been some governmental action[7] after October 1979 which could be construed as a taking, as it must to avoid an adverse decision based upon this Court's precedent under *United States v. Dow*, Intelicense cannot assert a taking and the Petition for Certiorari should be dismissed. *United States v. Clarke*, 445 U.S. 253, 256 n.3, 258 (1980).

The second question seeks a review as to whether the Amateur Sports Act of 1978 delegated "legislative power to an interested, private entity," which could then act to condemn or foreclose the exercise of property rights by others without due process or any form of review. However, the facts as found by the courts below clearly indicate that the United States Olympic Committee did not exercise legislative power; it did no more than exercise a *private* cause of action against those who would misappropriate its rights.

III. The Decision Below Is Not Likely To Affect Other Litigants.

Intelicense has argued below that its position is unique in that it is the only case to involve a defendant who has ostensibly been authorized by the IOC to commercially exploit the Olympic Symbol in this country. Aside from the findings below that Intelicense was not acting within the

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[7]The United States Olympic Committee is a private corporation; its acts do not constitute state action. *DeFrantz v. U.S. Olympic Committee*, 492 F. Supp. 1181, 1192 (D.D.C.), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980). Thus, the alleged acts by the United States Olympic Committee which occurred after 1979 cannot be attributed to the government, and cannot be a taking. The United States Olympic Committee was merely asserting its pre-existing exclusive rights against an interloper.

scope of IOC authorization,[8] the very uniqueness of Intelicense's position weighs heavily against the granting of certiorari since it is not even claimed, much less demonstrated, that the efforts of this Court will have a beneficial effect of generally relieving federal judicial burdens.

IV. Regardless Of The Decision Of This Court On The Issues Presented For Review, The Result In This Case Will Not Change.

In the unlikely event that this Court were to reverse its longstanding precedents and hold that ownership interests in the alleged property rights were to be measured after the act alleged to be a taking occurred, Intelicense could not prevail anyway in light of the alternative holdings of the district court in favor of the United States Olympic Committee. The property rights alleged by Intelicense are based upon the contract between the IOC and Intelicense. The district court found that the contract expressly provided that authorization by the United States Olympic Committee was required before marketing of any Olympic-related designations in the United States could take place and, further, that Intelicense at all times knew this restriction on its ability to market the pictograms.[9] The effect of this limitation on Intelicense's rights is that Intelicense had no rights which could be "taken." Therefore, it is clear that even if 1980 might be found to be the appropriate time for determining ownership in the property rights allegedly taken, in-

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[8] *See supra* note 6.

[9] The Second Circuit affirmed the finding of the district court that "the agreements provided that Intelicense must first receive the approval of each NOC" before marketing in the territory of any such NOC. (Petition at 23a). In addition the second alternative holding of the district court was that any broader interpretation of the license agreement would be unreasonable, since it would violate the provisions of the IOC's own Charter.

stead of 1978 as held by the courts below, the taking question is still not truly presented since Intelicense had no contractual right entitling it to license the pictograms in the United States in the absence of permission by the United States Olympic Committee.

Given this alternative ground for rejecting Intelicense's arguments it bears noting

> this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. See *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, 92 S.Ct. 1716, 1719, 32 L.Ed.2d 317 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568–575, 584, 67 S.Ct. 1409, 1419–1423, 91 L.Ed. 1666 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property.

Hodel v. Virginia Surface Mining and Recl. Ass'n, 452 U.S. at 294–295.

Remaining Undecided Issues

While the above premises in and of themselves provide substantial bases to deny the Petition, unresolved issues exist which further compel a denial of certiorari. First, to the extent that it is claimed that the property rights which allegedly have been "taken" are copyrights in the pictograms and in the Olympic symbol, there are unanswered questions as to whether the claimed copyrights in the pictograms are valid, and whether any copyright in the Olym-

pic symbol alone had been destroyed through publication without copyright notice, if it ever existed.[10]

Since resolution of these copyright questions was unnecessary for final disposition of the disputed claims raised by the parties, the courts below did not make any findings as to whether these registrations were valid, and if valid, what the extent of the protectable matter in those designs may have been. This circumstance would necessitate remanding the action to the district court for factual findings concerning the disputed copyright claims.

In addition, because the Second Circuit Court of Appeals found it unnecessary to review the alternative legal grounds decided by the district court, there remain both legal and factual questions making this inappropriate for Supreme Court review.

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[10]Despite petitioner's allegation that the IOC has held a copyright in the Olympic symbol since 1914, the courts below made no such finding. However, stipulated evidence that the Olympic symbol has been published without the copyright notice prescribed by statute precludes recognition of any copyright protection for the Olympic symbol. *See* 17 U.S.C. § 10 (1970). Although there are U.S. copyright registrations relating to the pictograms, the United States Olympic Committee challenged the validity of these registrations.

CONCLUSION

In view of Intelicense's blatant violation of § 380, its failure to abide by its contractual obligations, and its failure to follow the IOC Charter, this case does not present any constitutional questions appropriate for review by this Court.

For the reasons indicated, it is respectfully submitted that review by this Court is not warranted and the Petition for Certiorari should be denied.

Respectfully submitted,

UNITED STATES OLYMPIC COMMITTEE

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CERTIFICATE OF SERVICE

I, Richard G. Kline, Esq. member of the firm of Beveridge, DeGrandi & Kline, 1819 H Street, N.W., Suite 1100, Washington, D.C. 20006, counsel for the Respondent in the above entitled cause, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of October, 1984, I served copies of the foregoing Respondent's Brief in Opposition by mailing three copies thereof, in a duly addressed envelope with first class postage pre-paid, to the attorney of record for Petitioner, Peter F. Langrock, Esq., Langrock Sperry Parker and Wool, P.O. Drawer 351, Middlebury, Vermont 05753..

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